

No. 15858

United States
Court of Appeals
for the Ninth Circuit

ARTHUR EARL McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

FEB 13 1958

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

| | |
|--|----|
| Agreed Statement of Case on Appeal Pursuant to Rule 76 of the Federal Rules of Civil Procedure | 3 |
| Ex. A—Findings of Fact, Conclusions of Law and Judgment..... | 9 |
| Ex. B—Notice of Appeal..... | 16 |
| Attorneys, Names and Addresses of..... | 1 |
| Certificate by Clerk..... | 17 |

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee:

JORDAN A. DREIFUS,
600 Federal Building,
Los Angeles 12, California.

The United States Court of Appeals
for the Ninth Circuit

No. 19090-WB Civil

ARTHUR EARL McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

AGREED STATEMENT OF CASE ON APPEAL
PURSUANT TO RULE 76 OF THE FED-
ERAL RULES OF CIVIL PROCEDURE

The parties to this appeal, believing that the questions presented by the appeal of Arthur Earl McKnight from the judgment of the above District Court entered May 23, 1957, can be determined by the Court of Appeals to which said appeal has been taken, without an examination of all the pleadings, evidence and proceedings in said District Court, present this statement of the case as follows:

The parties agree that the facts as stated in the Findings of Fact that are attached hereto as "Exhibit A" [2*] are the agreed facts on this appeal. There is one exception to the aforementioned agreement, to wit: There should be no implication or inference that anything contained in Finding of Fact No. 14 shall be construed as an admission that

*Page numbering appearing at foot of page of original Certified Transcript of Record.

the plaintiff suffered a net loss in the payment upon the guarantee in the sum of \$1,453.64.

There are two typographical errors in the Findings of Fact and Conclusions of Law as follows:

(1) Finding of Fact No. 12 should read: "On May 27, 1948, at the Trustee's sale, the subject real property was sold to the Porterville Mutual Building and Loan Association for the sum of \$5,500.00."

(2) Conclusion of Law No. 2 should be corrected so that Title 38 should be Section 36.4320 to 36.4323, inclusive.

I.

The Legal Questions Involved That Arose in the District Court

(A) The questions presented by this appeal arose in the District Court and were decided as follows:

1. Is this action a proceeding for a deficiency judgment, or a suit on a contract of indemnity? [3]

Answer: The District Court decided that the action is on a contract of indemnity.

2. If it is a proceeding for a deficiency judgment, is it barred by California Code of Civil Procedure, Section 580(b)?

Answer: No; it is not a proceeding for a deficiency judgment.

3. Is the Government limited to whatever rights the Porterville Mutual Building and Loan Association had because of Title 38, U.S.C.A., Section 694(g), which provides that the Government is subrogated to the rights of the lender in case of default?

Answer: No.

4. If this is not a proceeding for a deficiency judgment and if the Government is not limited to the rights of the lender (Porterville Mutual Building and Loan Association), is there any authority for the regulation (Title 38, Code of Federal Regulations, 1946 edition, Section 36.4323), allowing indemnity?

Answer: There is authority for the regulation allowing indemnity.

II.

The legal conclusions found by the District Court are those that appear in the Conclusions of Law attached hereto as "Exhibit A." [4]

III.

The Defendant's Offer of Proof in the District Court

(A) The defendant offered to prove that the Veterans Administrator acquired the subject property at a total cost of \$7,047.50.

(B) The defendant offered to prove that the property was resold by the Veterans Administrator for a gross price of \$6,850.00, of which the net pro-

ceeds to the Veterans Administrator after commissions and fees was \$6,631.88.

The aforementioned facts were stipulated by the plaintiff to be true, but their offer and the evidence were rejected by the District Court on the grounds that the same were incompetent, irrelevant and immaterial to the issues.

IV.

The Appellant's Contentions for a Reversal of the Judgment

The points relied upon by the appellant for a reversal of the judgment are as follows:

(a) The action by the Government is a proceeding for a deficiency judgment.

(b) Being an action for a deficiency judgment, it is barred by the provisions of Section 580(b) of the California Code of Civil Procedure. [5]

(c) There is no statutory authority for the regulation known as Title 38, Code of Federal Regulations, Section 36.4323, which section the Court determined permitted indemnification in this proceeding.

(d) The Court committed error in refusing to receive into evidence the cost of acquisition of the property by the plaintiff and the cost of sale by the plaintiff, which evidence would show the net loss, if any, suffered by the Government.

(e) If the regulation permitting indemnity is regular and proper, the only loss suffered by the

Government to which indemnity should be permitted is the difference between the cost of acquisition by the Government of the property and the amount received upon the sale.

(f) The Court committed reversible error in finding that the Veterans Administrator suffered a loss in the sum of \$1,453.64.

(g) The Court committed reversible error in determining and finding that the Veterans Administrator paid out and suffered a loss of and at all times thereafter continued to so suffer the loss of the sum of \$1,453.64, which sum was on that date paid out by the Veterans Administrator.

(h) The Court committed reversible and prejudicial error in neglecting to find the fair reasonable market [6] value of the property on the day of the foreclosure sale by the lender.

A copy of the Findings of Fact, Conclusions of Law and Judgment appealed from and a copy of the Notice of Appeal are attached herewith as Exhibits A and B, respectively.

Agreement of Counsel

We, the undersigned, counsel for the plaintiff and defendant, respectively, hereby agree that the above and foregoing contain an agreed statement of the matters pertinent to this appeal, showing how the questions were decided before the United States District Court, the contentions of the defendant and appellant, and his offers of proof in the United

States District Court and a statement of the points to be relied upon by the appellant for a reversal of the judgment. The parties do further agree that the foregoing, when approved by the United States District Court, shall be certified to the Court of Appeals as the record on appeal.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

JORDAN A. DREIFUS,
Assistant U. S. Attorney;

By /s/ JORDAN A. DREIFUS.

/s/ ROBERT H. GREEN,
Attorneys for Defendant and
Appellant. [7]

The foregoing agreed statement having been presented to the Court and it appearing that it conforms to the truth and contains all matters necessary to present the questions raised by the appeal; it is, therefore, approved and ordered filed this 6th day of January, 1958, and the same shall be certified by the Clerk to the United States Court of Appeals, Ninth Circuit, as the record on appeal.

/s/ WM. M. BYRNE,
Judge of the U. S. District
Court. [8]

EXHIBIT A

United States District Court, Southern District
of California, Central Division

No. 19090-WB Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR EARL McKNIGHT,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled case having regularly come on for trial before this Court, the Honorable Judge William M. Byrne, presiding, on Tuesday, April 18, 1957, the plaintiff being represented by the United States Attorney by Jordan A. Dreifus, Assistant U. S. Attorney, the defendant appearing by his attorney, Robert H. Green, and evidence both oral and documentary having been introduced and received on behalf of both the plaintiff and the defendant, the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, the Court now makes the following Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

1.

This is a suit of a civil nature brought by the United [9] States of America. The defendant,

Arthur Earl McKnight, resides in Alhambra, California, within the Central Division of the Southern District of California.

2.

The defendant is a veteran of World War II and is entitled to and eligible for the veterans' benefits of the Servicemen's Readjustment Act of 1944 as amended.

3.

On August 1, 1947, the defendant obtained a loan from the Porterville Mutual Building and Loan Association of Porterville, California, in the sum of \$6,750.00 for which and to whom he made and delivered his promissory note on August 7, 1947. Said note provided inter alia, that defendant promised to pay the principal sum of \$6,750.00 plus interest at 4% per annum in installments. This note and loan was secured by a deed of trust on real property and was made for the purpose of the defendant's purchasing said real property. On the same date, the defendant signed Veterans Administration Form 4-1820 "Home Loan Report" and thereby applied to the Veterans Administrator for a guarantee of 50% upon the loan under the provisions of the Servicemen's Readjustment Act of 1944 as amended.

4.

On September 4, 1947, the Veterans Administrator approved the above said Home Loan Report and the application contained therein. On October 30, 1947, the Veterans Administrator issued duly executed V.A. Form 4-1899, "Loan Guaranty Cer-

tificate'' by which the Veterans Administrator undertook to guarantee 50% of the loan. Such guaranteed portion was equal to the sum of \$3,375.00.

5.

On September 1, 1947, defendant defaulted on payment of the note and loan to Porterville Mutual Building and Loan [10] Association, the lender and noteholder. He remained in default at all times thereafter. The Porterville Mutual Building and Loan Association thereafter elected to declare the whole sum of the principal and interest due immediately. On November 26, 1947, Porterville Mutual Building and Loan Association notified the Veterans Administrator by letter of the default of the defendant and of its election to foreclose on the loan and the security therefor. On December 4, 1947, the Veterans Administrator notified the defendant by registered mail that any sums paid out by the Veterans Administrator in satisfaction of a claim under the guarantee on the defendant's loan would constitute a debt owing by the defendant to the United States government.

6.

On January 23, 1948, the Porterville Mutual Building and Loan Association filed a claim with the Veterans Administrator for payment of the guarantee in the sum of \$3,375.00 on the loan. On May 10, 1948, the Veterans Administrator paid the Porterville Mutual Building and Loan Association

by United States Treasury check, the sum of \$3,375.00 pursuant to said claim.

7.

On January 26, 1948, the Porterville Mutual Building and Loan Association published and recorded in the official records of Tulare County, California, its Notice of Default and Election to Sell the real property which was the security by Trust Deed of the above-stated loan made to this defendant.

8.

On March 31, 1948, the Veterans Administrator authorized that the subject property be appraised for foreclosure purposes. With reference to such appraisal the Veterans Administrator instructed the appraiser specifically as follows: [11]

“Care should be exercised by the appraiser upon acceptance of the assignment to estimate a price which will produce a sale under present market conditions and at the same time protect the interests of the administration. Special attention should be given to items of repair to insure safeguarding the property as well as increasing saleability. The appraiser should alter his certification to clearly show that the appraisal is made for liquidation purposes and is not to be construed as ‘reasonable value.’ ”

9.

On April 16, 1948, said appraisal was made and reported on Veterans Administration Form 4-1803.

The liquidation value of the subject property on that date was \$6,171.00.

10.

On May 13, 1948, the Veterans Administrator established the "upset price" to govern, according to the applicable law and regulations, the trustee's sale of the subject real property. Said "upset price" was \$5,500.00.

11.

On May 17, 1948, the Veterans Administrator authorized the sale of the subject real property subject to the trust deed and subject to the said upset price of \$5,500 in accordance with the applicable law and regulations.

12.

On May 27, 1948, the trustee's sale of the subject real property was sold to the Porterville Mutual Building and Loan Association for the sum of \$5,500.00.

13.

As of May 27, 1948, immediately prior to the trustee's [12] sale of the property, the balance due the Porterville Mutual Building and Loan Association from defendant, after crediting on the account the \$3,375.00 paid by the Veterans Administrator, was in the net sum of \$3,578.64. As of the same date, immediately after the Trustee's sale, there was further credited upon the defendant's account the sum of \$5,500.00, the sale price, which thereupon extinguished defendant's indebtedness to Porterville Mutual Building and Loan Association and which

left an excess in the hands of Porterville Mutual Building and Loan Association in the amount of \$1,921.36. Said sum of \$1,921.36 being, under the applicable law and regulations, held for the use and benefit of the plaintiff, said sum was credited by the Veterans Administrator against the sum of \$3,375.00 previously paid out by him as aforesaid.

14.

The Veterans Administrator thus suffered a loss in the payment of the claim upon the guarantee on defendant's loan on May 18, 1948, in the sum of \$3,375.00, which was diminished on May 27, 1948, to a net loss in the sum of \$1,453.64.

15.

The defendant has failed, neglected and refused to pay the sum of \$1,453.64 or any part thereof to the plaintiff, and the whole thereof said sum remains unpaid to the plaintiff from the defendant.

Conclusions of Law

1.

This Court has jurisdiction under 28 U.S.C. 1345.

2.

At all times material to this case there were published and in effect regulations pursuant to law as authorized by the [13] Servicemen's Readjustment Act of 1944 as amended. In particular, there was in effect Code of Federal Regulations, 1946 Supple-

ment, Title 38, Sections 36.4230 to 36.4323, inclusive.

3.

On May 18, 1948, the Veterans Administrator paid out and suffered the loss of, and at all times thereafter continued to so suffer the loss of, the sum of \$1,453.64, which sum was on that date paid out by the Veterans Administrator in satisfaction of the claim under the guarantee on the defendant's loan.

4.

Pursuant to Code of Federal Regulations, 1946 Supplement, Title 38, Section 4323(e), the defendant became liable to indemnify the Veterans Administrator for any loss from any amounts paid by the Administrator on account of the liability of the defendant guaranteed under the provisions of the Servicemen's Readjustment Act of 1944 as amended.

5.

On May 18, 1948, defendant became therefore indebted to the plaintiff in the sum of \$1,453.64. This indebtedness remaining thereafter unpaid, interest has accrued thereon at the rate of 4% per annum.

6.

Judgment should therefore be entered for the plaintiff in the principal sum of \$1,453.64, and for interest thereon at the rate of 4% per annum from May 18, 1948, to date, and for costs.

7.

Let judgment be entered accordingly. [14]

Judgment

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover of the defendant the principal sum of \$1,453.64, plus interest on said principal sum at 4% per annum from May 18, 1948, to May 10, 1957, in the amount of \$522.03 plus costs in the sum of \$41.90;

All of which is in the total sum of \$2,027.57 as of the date May 10, 1957, plus such further interest as shall accrue upon said principal from that date to the date of judgment at the rate of \$0.1597 per day.

Dated: This 22nd day of May, 1957.

WM. M. BYRNE,

Judge, U. S. District Court.

Lodged May 3, 1957.

[Endorsed]: Filed May 22, 1957.

Docketed and entered May 23, 1957. [15]

EXHIBIT B

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the Defendant Arthur Earl McKnight and appeals to the Court of Appeals of the United States from the judgment, and the whole thereof, and from the order denying the motion for a new

trial and from the order denying the motion to amend and alter the judgment and the whole thereof.

Dated this 18th day of July, 1957.

ROBERT H. GREEN,
Attorney for Defendant.

[Endorsed]: Filed July 18, 1957. [16]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 16, inclusive, containing:

(Original) Agreed Statement of Case on Appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure and Order of Court thereon

(Copy) Findings of Fact and Conclusions of Law and Judgment

(Copy) Notice of Appeal

I further certify that my fee for preparing the foregoing record, amounting to \$1.20 has been paid by appellant.

Dated: January 6, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk;

By /s/ WM. A. WHITE,
 Deputy Clerk.

[Endorsed]: No. 15858. United States Court of Appeals for the Ninth Circuit. Arthur Earl McKnight, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 8, 1958.

Docketed: January 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.